

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

NICHOLAS GERARDI,

Plaintiff,

- against -

HOME DEPOT,

Defendant.

08 Civ. 5616 (SCR) (LMS)

**REPORT AND
RECOMMENDATION**

**TO: THE HONORABLE STEPHEN C. ROBINSON,
UNITED STATES DISTRICT JUDGE**

The *Pro Se* Office for the Southern District of New York received Plaintiff Nicholas Gerardi's Complaint against his former employer Defendant Home Depot on May 5, 2008. See Docket #2, Complaint. This case was originally assigned to the Honorable Paul A. Crotty, United States District Judge, who transferred the case to the White Plains Federal Courthouse pursuant to Rule 21 of the Local Rules for the Southern and Eastern Districts of New York. See Docket #3, Transfer Order. Upon transfer, the case was reassigned to Your Honor, and by Order of Reference dated July 28, 2008, the case was referred to the undersigned for general pretrial supervision. See Docket #5, Order of Reference.

Plaintiff's Complaint contains allegations of employment discrimination, which construed liberally suggest that Defendant engaged in acts of discrimination against the Plaintiff based upon injuries he sustained during the course of his employment. See Docket #2, Complaint at p. 3. Plaintiff purports to seek reinstatement to his position of employment with the Defendant, along "with all of the benefits [he] would have received if [he had not] been terminated; raises, vacation pay, sick time, social security contributions, all [his] salary and

benefits covering the period from when [he] was terminated to now and \$1,000,000.00 for pain and suffering.” See Docket #2, Complaint, “Why Federal Court should hear my case.”

On January 30, 2009, the chambers of the undersigned sent Plaintiff a second Rule 4(m) notice, a copy of which is attached hereto as Exhibit A. See Docket #6, Second Notice Pursuant to Rule 4(m). This was the second letter sent to the Plaintiff by the chambers of the undersigned. On February 6, 2009, the letter was received back by my chambers containing a yellow computer generated ticket which reads, in part, “Return to Sender, Attempted – Not Known, Unable to Forward.” A copy of the returned correspondence is attached hereto as Exhibit B.

There is nothing on the docket sheet of this case or in the Court file which contains any updated address for Plaintiff. Plaintiff’s state of residence had initially been inputted incorrectly by the Clerk of the Court as being New Jersey; the chambers of the undersigned corrected this error along with the mailing of the second Rule 4(m) notice to Plaintiff. The first 4(m) notice, although not docketed, was addressed to Plaintiff in New York. Plaintiff has not contacted the chambers of the undersigned, either in person or by mail, to inquire into the status of his case.

There is no evidence in the Court file that Plaintiff has made any effort to effect service of process of his Complaint on the Defendant in accord with Rule 4(m) of the Federal Rules of Civil Procedure. Under these circumstances, where service of the summons and Complaint has not been made on the Defendant within 120 days of the filing of the Complaint, where the undersigned has made efforts to inform Plaintiff of the consequences for failing to effect service of process on the Defendant in a timely manner, and where Plaintiff has not updated his address or provided the Court with his new address, I respectfully recommend that Your Honor should dismiss this action without prejudice. See FED. R. CIV. P. 4(m). In the event that Plaintiff

provides Your Honor with a submission establishing good cause for his failure to have effected service in a timely fashion, then I respectfully recommend that he be granted no more than 30 days to effect service. A copy of this Report and Recommendation will be sent to Plaintiff at the last address for Plaintiff on file with the Clerk of the Court.

NOTICE

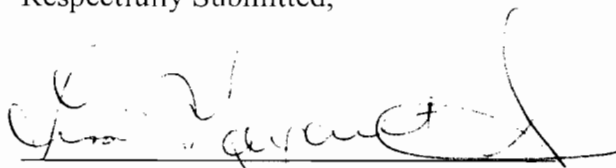
Pursuant to 28 U.S.C. §636(b)(1), as amended, and FED. R. CIV. P. 72(b), the parties shall have ten (10) days, plus an additional three (3) days, pursuant to FED. R. CIV. P. 6(d), or a total of thirteen (13) working days, see FED. R. CIV. P. 6(a), from the date hereof, to file written objections to this Report and Recommendation. Such objections, if any, shall be filed with the Clerk of the Court with extra copies delivered to the chambers of The Honorable Stephen C. Robinson at the United States Courthouse, 300 Quarropas Street, White Plains, New York, 10601, and to the chambers of the undersigned at the same address.

Failure to file timely objections to this Report and Recommendation will preclude later appellate review of any order of judgment that will be entered.

Requests for extensions of time to file objections must be made to Judge Robinson.

Dated: March 5, 2009
White Plains, New York

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Lisa Margaret Smith', written over a horizontal line.

Lisa Margaret Smith
United States Magistrate Judge
Southern District of New York

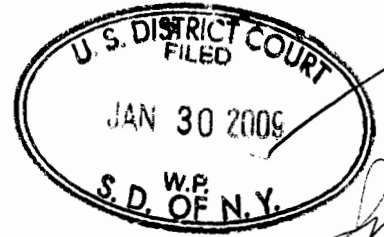
A copy of the foregoing Report and Recommendation has been sent to the following:

The Honorable Stephen C. Robinson, U.S.D.J.

Plaintiff Nicholas Gerardi
c/o Ms. Terry Vitale
631 North Terrace Ave
Mount Vernon, New York 10552

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
300 QUARROPAS STREET
WHITE PLAINS, NEW YORK 10601



Chambers of
Hon. Lisa Margaret Smith
United States Magistrate Judge

January 30, 2009

SECOND NOTICE
PURSUANT RULE 4(m)

Nicholas Gerardi
c/o Terry Vitale
631 North Terrace Avenue
Mount Vernon, NY 10552

The record of the court does not indicate service of the summons and complaint in the matter of **GERARDI-V-HOME DEPOT** 08 Civ 5616(SCR)(LMS) which was filed on June 20, 2008.

Rule 4(m) of the Federal Rules of Civil Procedure provides (in part):

If a defendant is not served within 120 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. . . .

**Failure to respond to this notice within 30 days may result in the dismissal of this action.
This is the second notice of such failure to complete service of process.**

Please direct any inquiry regarding this procedure to the Pro-Se Office of the Court.

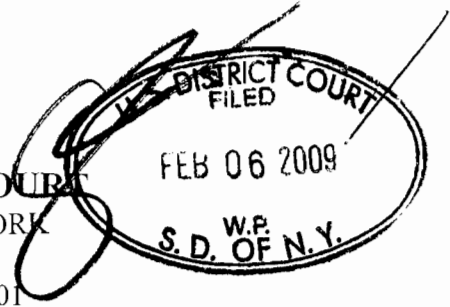
The Pro Se Office can be reach by phone at 212-805-0177

SO ORDERED:


Hon. Lisa Margaret Smith
U.S.M.J.

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
300 QUARROPAS STREET
WHITE PLAINS, NEW YORK 10601



Chambers of
Hon. Lisa Margaret Smith
United States Magistrate Judge

January 30, 2009

SECOND NOTICE
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SO ORDERED:


Hon. Lisa Margaret Smith
U.S.M.J.

OFFICIAL BUSINESS



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631 North Terrace Ave
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